

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ADIN B.,

Claimant,

OAH No. L 2006040438

vs.

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

DECISION

Administrative Law Judge Gary Brozio, State of California, Office of Administrative Hearings, heard this matter in Santa Ana, California, on August 25 and November 16, 2006.

Mary Kavli, Program Manager, Fair Hearings & Mediations, represented the Regional Center of Orange County (RCOC).

N. Jane DuBovy, M.A., J.D., represented Adin B. (claimant). Claimant's parents were present throughout the proceedings.

The matter was submitted on November 16, 2006.

ISSUE

Adin is a six-year old regional center consumer who has a diagnosis of autism and needs services to develop his social skills. Adin's parents want RCOC to pay for a relatively new program called Relationship Development Intervention (RDI), but RCOC has refused funding for RDI services on the theory that RDI is an "experimental" program that is not "effective." The issue is whether Adin is entitled to RDI services under the Lanterman Act.

FACTUAL FINDINGS

Background

1. Autism is a developmental disability, but in the last two decades the diagnosis has grown to include many individuals who are not considered to be substantially

handicapped. Today, it is common to refer to an “autism spectrum,” and even to diagnose individuals with “autism spectrum disorder,” without differentiating between the recognized diagnoses in the DSM-IV-TR.

2. Science does not know the cause of autism. Nor does science know the cure. Autism can only be treated, and treatment varies considerably depending upon many factors including where the individual falls on the autism spectrum and the level of the individual’s cognitive functioning.

3. The psychological profession has been largely responsible for developing treatments for autistic children. Today, the most widely accepted method of treating autism is a form of behavior therapy known as Applied Behavioral Analysis (ABA). Psychologists have tested and retested ABA techniques since 1964. The techniques are proven to improve the symptoms of autism. Over the past fifty years, many other proposed treatments have been fully discredited, and others have survived despite a lack of general acceptance.

4. Adin is a six-year-old autistic child. Although he is a regional consumer, he is quite gifted and high functioning. Nevertheless, it is undisputed that Adin needs to develop and improve his social skills. He needs to decrease tantrums, anxiety, the need for control, and rigidity. He needs to learn how to be more reciprocal in social interactions.

5. Adin’s parents have tried several ABA programs but have not been satisfied with the results or the methodology. Adin’s parents want to use the RDI program exclusively, and they have refused to place Adin in any of the ABA programs authorized by RCOC, including RCOC’s recent offer to enroll Adin in Inclusive Education and Community Partnership (IECP). Adin’s parents have paid for the RDI services Adin has received to date. In their opinion, Adin’s social development has benefited from the RDI services much more than from the ABA services. Adin’s parent’s firmly believe that their son’s social development will be better served by the RDI program. Adin’s parent’s want to continue the RDI program, but they cannot afford it. They asked RCOC to fund it.

6. RCOC seriously considered Adin’s parents’ request for RDI services but ultimately concluded that RDI was an “experimental treatment.” RCOC has a policy against funding experimental treatments and requires that the services it provides to consumers be “validated.” RCOC concluded that RDI had not been adequately tested and denied funding under Welfare and Institutions Code section 4512, subdivision (b).

Key Provisions of the Lanterman Act

7. The Lanterman Act does not prohibit regional centers from funding experimental services. Nor does it prohibit regional centers from funding new or developing services. It contains no requirement that services meet state or federal standards, that services be peer reviewed, or that services be generally accepted in the relevant scientific community. The Act merely requires that services be “effective” in meeting the goals in the

individual program plan, and it requires regional centers to “produce evidence” that services are effective. (Welf. & Inst. Code, §§ 4501; 4512, subd. (b).)

The Act does not define the word “effective.” Thus, the Legislature intended the word to have its common meaning. As used in the Lanterman Act, the word “effective” means “adequate to accomplish a purpose; producing the intended or expected result.” (*Dictionary.com. Dictionary.com Unabridged* (v 1.0.1), Based on the *Random House Unabridged Dictionary*, Random House, Inc. 2006. [http://dictionary.reference.com/browse/effective.](http://dictionary.reference.com/browse/effective))

Claimant had the burden to show, by a preponderance of evidence, that he was entitled to funding for RDI services. (Evid. Code, § 115.) Thus, it was claimant’s burden to show that RDI services likely would be adequate to improve his socialization skills.¹

Claimant’s Expert

8. Linda Andron-Ostrow has a master’s degree in social work and is a licensed clinical social worker. She had treated children with autism and similar conditions for over 40 years. She is familiar with the modern systems used to treat autistic children, including Applied Behavioral Analysis (ABA). She currently runs an agency devoted to providing children with RDI services. She has been certified to provide RDI services for three years. She is a vendor of RDI services to Westside Regional Center.

9. The RDI model for treating autism was developed by Steven Gutstein, Ph.D. RDI’s model was based on the DSM-IV-TR’s criteria for autism as well as longstanding principles of child development. RDI’s model was premised on research showing that children have a typical pattern for developing social and communication skills. These skills begin to develop in a child’s first 18 months. In that initial period, the child develops these skills in the day-to-day interactions with his or her parents. (There is no significant interaction with other children at this time.) The parents constantly present the child with new encounters. (The example used at the hearing was the game of peek-a-boo). Even though these encounters are repeated frequently, no two of them are exactly the same. They take place at different times and in different locations. They have countless variations. Despite the dissimilarities, the child must learn to recognize the patterns, which is known as appraisal. Developing the ability to appraise and recognize patterns creates a certain amount of tension. The child must process the tension and absorb the new information before moving on to the next skill, which in turn creates flexibility and promotes interrelationship (experience-sharing).

10. The typical child processes the tension, absorbs a small amount of new information, and moves on to the next level of development. Each skill learned acts as a building block for the next. In other words, the skills accumulate and form a foundation.

¹ This case does not involve an issue of “cost effectiveness” because RDI services cost the same or less than ABA services. Moreover, the RDI program can be tailored to cost the same or less than the IECF program.

The developers of the RDI model theorize that autistic children do not go down this path because they cannot handle the tension. The tension proves to be too much. Thus, the autistic child begins to employ static systems and other autistic features to control the stress. These alternative systems break the pattern of development, and the foundation does not get built. The underdevelopment in social skills later shows itself in peer relationships. Ms. Ostrow explained that this theory had not been proven conclusively, but it was supported by the current research, especially the research in child development.

11. The RDI program seeks to construct the autistic child's missing foundation. It seeks to build the child's missing skills, not by repetition like APA-based approaches, but by building the child's internal motivation to interact with other people.² This is accomplished by RDI therapists teaching the parents to interact with the child in every-day situations in ways that target the child's deficits and build increasingly challenging dynamic systems. The program is designed to create carefully framed opportunities that work seamlessly into the child's routine. Each child is individually evaluated and tested, and the parents participate in a several-day training phase. The RDI consultant then develops a specialized program to assist the parents in implementing the plan. The consultant works with the parents in monthly consultations and reevaluations, which include the assessment of videotapes and personal meetings.³

12. The RDI approach is supported by two studies. Steven Gutstein and several associates conducted the first study at The Connections Center in Houston, Texas. It was conducted with 17 children from January 2001 to November 2002. The study compared results of a group of children receiving RDI treatment with a non-RDI group. The changes were assessed using the ADOS, which includes Social Interaction and Communication subscales. The study concluded that the 70 percent of the children in the RDI group showed a significant decrease in symptoms in at least one diagnostic category. Some of the children improved quite dramatically. In contrast, no child in the non-RDI group improved. The study concluded that it had several limitations that forestalled a definitive conclusion and recommended further evaluation. Ms. Andron-Ostrow believed that this study was recently accepted for publication by the Journal of Autism and Developmental Disorders.

13. Steven Gutstein and several associates conducted the second study with 16 children between 2000 and 2005. This study was more thorough than the first. It involved motivated, two-parent families who had an average of four hours a month of therapist contact. Before the study, ADOS scores were available for 12 of the children who were all

² Unlike ABA approaches, RDI does not involve counting or looking at the child's behavior in a vacuum. RDI focuses on the interaction between two people and the obstacles that prevent it. RDI teaches the autistic child to read and judge social situations by developing appraisal skills, which allow the child to consider variables and react differently to different situations. It teaches a child to get pleasure out of the master-apprentice relationship, thus undercutting the autistic child's need to have things his way. RDI develops a child's natural motivation to interact, rather than imposing an external motivation. It treats the core deficit rather than the symptoms.

³ The RDI program has accountability and a measurement system. There is a progress tracking form. Parents keep notes and review videotapes with the consultants on a monthly basis. The Autism Diagnostic Observation Scale (ADOS) measures the child's progress.

diagnosed with autism. Afterward, no children met the combined criteria for autism in the ADOS and Autism Diagnostic Interview-Revised. The study revealed marked reductions in the children's ADOS scores, and showed that the children maintained significant improvements over time. The greatest changes were in flexibility. Twelve children improved from the least flexible two categories to the most flexible two categories. They were more able to handle unexpected changes in familiar routines, unexpected omission of routine activities, and changes in activities without preparation. The study concluded that RDI "appears to be a powerful, cost-effective method of remediating the critical experience-sharing deficits of children on the autism spectrum." The children became "more socially related, engaged in significantly more reciprocal communication, functioned in school settings with less adult participation and also behaved in a dramatically more flexible and adaptive manner." In addition, all of the parents noted an improvement in the quality of family life. This second study had been subject to peer review but had not yet been published.

14. Ms. Andron-Ostrow testified that Adin was a good candidate for the RDI program. His parents were highly motivated. They were committed, could provide consistent parenting, and could comply with the RDI schedule. They had attended the initial training program and had used the method to Adin's advantage, but they could no longer afford the service. Adin had made significant progress with the RDI method.⁴ Ms. Andron-Ostrow testified that Adin could make greater progress if his parents received consistent training from an RDI therapist. She recommended ten hours of RDI intervention per month, but conceded that the program could succeed with less hours. She recommended the program for three years, but conceded that further intervention might be necessary.

15. In Ms. Andron-Ostrow's opinion, Adin would not make as good progress in an ABA program or the IECF program. These programs would not teach him to deal successfully with peers. His good verbal skill would permit him to avoid the more-direct development encouraged by the RDI system. The RDI system would provide Adin with the greatest chance of functioning independently when he got older because it addressed the core deficits of autism.

16. In 2005, approximately 200 professionals were certified as RDI consultants and 3000 families participated in the treatment worldwide. RDI is a propriety service and only The Connection Center provides the training.⁵ As the result of a fair hearing in 2004, Westside Regional Center made Ms. Andron-Ostrow a vendor of RDI services in Los Angeles. Westside Regional Center pays \$85 per hour for the service and supplies

⁴ Claimant introduced two videos demonstrating his parent's use of the method. At the hearing, Ms. Andron-Ostrow explained what methods were being used and how they worked.

⁵ The RDI consultant must have a master's degree and must be certified by The Connections Center in Houston, Texas. The consultant must keep abreast of recent developments in autism and child development. Only certified consultants may provide the service.

consumers with ten hours a month. Some regional centers in northern California are also using the RDI program.

RCOC's Expert

17. John Cone, Ph.D., is a licensed clinical psychologist who is a Board Certified Behavior Analyst. He has done eligibility determinations for RCOC for 15 years, and he has worked with autistic children for over 40 years. Dr. Cone had performed considerable research in training developmentally disabled children to acquire social skills. He was intimately familiar with the methods scientists use to conduct reliable studies and experiments. He was a highly qualified expert in ABA.⁶

18. As Dr. Cone explained, all of RCOC's services for autistic children are in the ABA context. ABA is the treatment of choice at the present time. It has many decades of studies demonstrating that it is effective in improving social skills, as well as the other deficits associated with autism. Dr. Cone personally assessed Adin and fitted him with the ABA program he believed most appropriate for Adin's overall development.

19. Dr. Cone had a basic familiarity with the RDI method but could not recommend it because it had not been adequately studied. Concerning Dr. Gutstein's studies, Dr. Cone had two main complaints. First, they were not reliably conducted. Dr. Cone explained that, in the field of psychology, there are two ways to conduct acceptable studies. The first is randomized controlled trials by independent laboratories. This method requires a control group and is difficult to accomplish with developmentally disabled children. The second method is multiple single studies of individuals. This method requires that a treatment be applied to an individual and the individual's progress is charted at given points in time. Several individual studies are then compared to see whether the technique produces the same or similar effect in each case. Dr. Gutstein's studies failed to comply with either method.⁷

20. Second, the studies had not been peer reviewed. Dr. Cone had a personal conversation with the editor of the *Journal of Autism and Developmental Disorders*. The editor explained that Dr. Gutstein's first study had been accepted for publication on the condition that certain changes were made, including labeling it as a "brief report." The editor also wanted to allow critics to make critiques, and then permit Dr. Gutstein to rebut them. But Dr. Gutstein had not consented to these terms. The editor felt that Dr. Gutstein

⁶ Susan Lowe also provided expert testimony but it was duplicative of Dr. Cone's testimony on the issues pertinent to this decision. Moreover, Dr. Cone was more qualified to render the opinions relevant to this decision. Consequently, the decision focuses on Dr. Cone's testimony.

⁷ Dr. Cone gave detailed reasons why Dr. Gutstein's studies were not adequate to prove the effectiveness of RDI. In general, the studies were neither independent nor random; the control groups were not equivalent at the outset; and the ADOS was not a proper tool to measure progress. In addition, the RDI method itself did not address all the deficits present in autism. It confined itself to socialization.

might be misrepresenting RDI's effectiveness. In addition, DR. Gutstein had published the article on his website which created copyright issues.

21. Dr. Cone acknowledged that some of the techniques used in the RDI looked interesting and that some of the techniques resembled ABA techniques. He acknowledged that Adin's parents were fully aware of RDI's potential shortcomings and that their request was being made with complete informed consent. Nevertheless, he could not ethically recommend the RDI program for regional center consumers given that RDI was an untested technique and proven ABA techniques were available. He could not recommend RDI under the Lanterman Act because it had not been shown to be effective.

Adin's Parents

22. Adin lives with his mother and father, who are undeniably good parents and are both fully committed to Adin's development. They began learning the RDI method in April 2005. They read the RDI book and watched the DVD. In June 2005, they got an RDI assessment. In February 2006, they attended a four-day RDI seminar. They began using the techniques and attending regular sessions with a consultant. Unfortunately, they eventually had to abandon the sessions due to the financial strain and lengthy commute. Nevertheless, they remained fully committed to the RDI approach and kept employing the RDI techniques to the best of their ability.

Adin's mother explained that the RDI program taught Adin to interact with his parents with joy. He had become interested in what his parents were thinking and doing. She had seen significant changes in Adin's emotion sharing, conversation, self-regulation, and social referencing. She had seen no such improvement from the ABA programs, which in her estimation were overly rigid and only addressed isolated behaviors. She had seen more improvement in Adin from the RDI techniques than all the ABA interventions combined. Adin's mother admitted that ABA served a useful purpose in Adin's younger years, but she felt strongly that ABA techniques could not address Adin's social development as well as RDI.

Evaluation

23. Claimant met his burden of showing that RDI services likely would improve his personal social development. There are six reasons why. First, Dr. Gutstein's testing lent some credence to the RDI method. Even though the testing was not sufficiently reliable to prove effectiveness by itself, it provided reason to believe that the RDI method could benefit the socialization of some children on the autistic spectrum. Second, no studies have discredited the RDI method, which is to say that claimant is not requesting funding for a treatment that is known to be harmful. Third, hundreds of families are currently using the RDI method. No evidence was presented that any of these families, or the professionals assisting them, found the method to be harmful or ineffective. Fourth, the likelihood of a benefit from the RDI method increases when the individual child matches the profile of the subjects in Gutstein's studies. Here, Adin is young, he is not severely autistic, he has

relatively high intelligence, and he has two highly motivated parents. Fifth, there was credible expert testimony that RDI has significantly helped children with similar profiles. Sixth and most importantly, Adin has actually used the RDI method and an expert witness and his parents testified that the method contributed significantly to improvements in his socialization. RCOC experts presented no evidence that these observations of improvement were false.

24. RCOC convincingly demonstrated that RDI is not ready for use by all autistic children. The current testing is not sufficiently reliable to permit generalized application. More and better testing is necessary to demonstrate effectiveness. Meaningful peer review is required. But claimant was not required to prove the efficacy of the method in general; he merely had to show that it would likely be effective to meet the goals of *his* IPP. The highly unusual facts of this case demonstrated that he made that showing, with the determining factor being his former use of the method coupled with uncontradicted evidence of improvement. This made it more likely than not that Adin will benefit from continued use of the RDI method.

25. There are reasonable ways for RCOC to meet its statutory obligation to assure effectiveness. As Dr. Cone confirmed, tests like the Vineland can be used to chart improvement against Adin's appropriate age group. It is not necessary to rely on the ADOS. Even though RDI is a proprietary service, claims of improvement in Adin's case can be verified by RCOC professionals. In short, if RDI does not produce measurable results similar to those expected from ABA techniques, RCOC could terminate funding for Adin's RDI services.

26. Although RCOC proved that ABA methods exist to effectively treat Adin's condition, claimant demonstrated by a preponderance of evidence that this is an appropriate case to fund RDI services based upon family preference. The RDI services cost the same or less than ABA services. Unless RCOC professionals later determine that RDI services are not producing results similar to those expected from ABA services, the parents' strong preference for RDI services must govern the choice in this case.

27. The foregoing reasoning does not extend to the past expenditures. Adin's parents had to expend personal funds on the RDI program to demonstrate that the method likely would work for him. RCOC was not obligated to fund that effort. Funding for Adin's RDI services is prospective only.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Act) is contained in the Welfare and Institutions Code. (Welf. & Inst. Code, § 4500 et. seq.) The purpose of the Act is to provide a "pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life." (§ 4501; *Association of Retired Citizens v. Department*

of Developmental Services (1985) 38 Cal.3d 384, 388.) Such services include assessing the needs of each developmentally disabled person, and on an individual basis, selecting and providing services to meet those needs. (§§ 4642-4643; 4646-4647; *Association of Retired Citizens, supra*, 38 Cal.3d at 388.)

2. A developmentally disabled person has the right to treatment at state expense. (*Association of Retired Citizens, supra*, 38 Cal.3d at 389.) The regional center is charged with providing developmentally disabled persons with “access to the facilities and services best suited to them throughout their lifetime.” (§ 4620; *Association of Retired Citizens, supra*, 38 Cal.3d at 389.) The developmentally disabled person’s IPP identifies the necessary services and must include, among other things, a statement of time-limited objectives for improving the situation and a schedule of the type and amount of services necessary to achieve the IPP’s objectives. (§ 4646; *Association of Retired Citizens, supra*, 38 Cal.3d at 390.)

3. When providing services, the IPP must serve competing objectives. The IPP must ensure consumers get the services they need. At the same time, the IPP must secure services that are effective, and cost effective, and to the extent possible, reflect the preferences of the consumer and his parents. (§§ 4512, subd. (b); 4646.)

4. The two critical statutes in this case are Welfare and Institutions Code sections 4501 and 4512, subdivision (b). Section 4501 provided in relevant part:

“The complexities of providing services and supports to persons with developmental disabilities requires the coordination of services of many state departments and community agencies to ensure that no gaps occur in communication or provision of services and supports. *A consumer of services and supports, and where appropriate, his or her parents, legal guardian, or conservator, shall have a leadership role in service design.*

...

Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age. Consumers of services and supports, and where appropriate, their parents, legal guardian, or conservator, should be empowered to make choices in all life areas. These include promoting opportunities for individuals with developmental disabilities to be integrated into the mainstream of life in their home communities, including supported living and other appropriate community living arrangements. *In providing these services, consumers and their families, when appropriate, should participate in decisions affecting their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way in which they spend their time, including education, employment, and leisure, the pursuit of their own personal future, and program planning and implementation.* The contributions made by parents and family

members in support of their children and relatives with developmental disabilities are important and those relationships should also be respected and fostered, to the maximum extent feasible, so that consumers and their families can build circles of support within the community.

The Legislature finds that the mere existence or the delivery of services and supports is, in itself, insufficient evidence of program effectiveness. *It is the intent of the Legislature that agencies serving persons with developmental disabilities shall produce evidence that their services have resulted in consumer or family empowerment and in more independent, productive, and normal lives for the persons served . . .*” (Emphasis added.)

Section 4512, subdivision (b) provides:

“‘Services and supports for persons with developmental disabilities’ means specialized services and supports . . . directed toward the alleviation of a developmental disability or . . . toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the *needs and preferences of the consumer or, when appropriate, the consumer's family*, and shall include consideration of a range of service options proposed by individual program plan participants, *the effectiveness of each option* in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to . . . *training for parents of children with developmental disabilities . . .*” (Emphasis added.)

5. Factual Finding 7 is incorporated into these Legal Conclusions.

6. Claimant met his burden of showing that RDI services would likely be effective to implement the goals of his IPP. Although ABA services would also be effective, claimant met his burden of showing that parental preference should govern the choice in this case. Claimant is entitled to have RCOC fund RDI services, provided that he permits RCOC professionals to conduct periodic testing, and provided that the vendor of this proprietary service complies with the applicable state statutes and regulations. Claimant did not meet his burden of showing that he is entitled to reimbursement for past expenditures. These conclusions are based on all the Factual Findings and Legal Conclusions.

ORDER

1. RCOC shall fund claimant’s RDI services for one year, which shall include funding for a reasonable assessment and plan. To the extent possible, the assessment and plan shall make use of claimant’s former RDI assessments to minimize cost.

2. Claimant must be tested for improvement over the year that he receives RDI services. At minimum, claimant must be tested before receiving RDI services and at the end of the year of services. RCOC may rely on the RDI program's testing if RCOC so chooses, but RCOC retains the right to select and administer independent tests to determine effectiveness.

3. RCOC shall initially fund consultation hours at the rate of 8 hours per month. RCOC shall have the right to reduce the consultation hours to as few as 4 hours per month if fewer hours prove to be effective.

4. RCOC shall locate and provide a vendor. The vendor of this proprietary service must comply with the applicable state statutes and regulations. RCOC may terminate the service an acceptable vendor cannot be located.

5. If, after the end of the year, the RDI program has not been effective in implementing the goals of claimant's IPP under Welfare and Instructions Code sections 4501 and 4512, subdivision (b), then RCOC may terminate the service.

6. Claimant's request for reimbursement for past expenditures for the RDI program are denied.

DATED: _____

GARY BROZIO
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.